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Via email: MSC_clerk@courts.mi.gov

Michigan Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2011-03 – Proposed Amendment of Rule 9.113

Dear Mr. Davis,

I am General Counsel of Varnum LLP and submit these comments on the proposed amendment to Rule 9.113. The proposed amendment would unduly and unnecessarily limit the existing discretion of the Grievance Administrator. I join the Grievance Administrator and the Board of Commissioners of the State Bar of Michigan in opposing the amendment.

Currently, the Administrator may exercise discretion under Rule 9.113 with regard to providing to a complainant a lawyer's response (and supporting documentation) to a request for investigation. The Administrator's discretion is especially important in cases where a request is filed by a non-client, e.g., an opposing party or opposing counsel, during pending litigation or transactions. In these situations, a lawyer's ability to provide a complete and candid response may require the disclosure of information that is protected by MRCP 1.6 (with client permission, of course). Unduly restricting the Administrator's discretion places lawyers in the untenable position of balancing the need to defend themselves and their ethical obligations in representing a client. If the proposed amendment is adopted, lawyers are likely to face situations where they cannot adequately respond to a request out of concern that confidential information must be disclosed to an opponent.

The proposed change may also encourage complainants involved in litigation to misuse the request for investigation process as an alternative form of discovery. Litigants should be limited to the discovery permitted by MCR 2.300, et seq, or other relevant discovery rules. The request for investigation process should not give litigants aggrieved by a court's discovery ruling a second bite at the apple. Litigants may also use the request for investigation process to delve into a lawyer's strategy or work product, again a misuse of the grievance process.

We should not ignore the unfortunate prospect that the request for investigation process is misused for the improper purpose of creating a potential conflict between a lawyer and client, or to obtain an undeserved advantage. While hopefully a rare occurrence, the proposed amendment



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might exacerbate this problem by increasing the use of requests for investigation for improper purposes.

The proposed amendment would not likely advance the stated goal of the grievance process to protect the public, the courts and the legal profession. Rule 9.113 places the responsibility for balancing these sometimes divergent interests with the Administrator through the exercise of wise discretion where cause is shown. The proposed change disrupts this delicate balance in a manner that encourages abuse of the grievance process. Respectfully, the proposed amendment should not be adopted.

Very truly yours,

VARNUM

A handwritten signature in blue ink, appearing to read "Teresa S. Decker".

Teresa S. Decker

TSD/cll
5460302